The Cramdown

The Newsletter of the Tampa Bay Bankruptcy Bar Association WINTER 2005

Editor, Luis Martinez-Monfort, Mills Paskert Divers P.A.

PRESIDENT'S MESSAGE

Although Judge Baynes will be retiring soon, he leaves a lasting and substantial legacy through his scholarship and authored opinions. During his tenure on the bench, Judge Baynes had 145 opinions published. Many of these opinions will continue to impact our practice for years to come.

The TBBBA February 15th luncheon program will be a retrospective on some of Judge Baynes' most significant rulings and opinions. Jeff Warren will host a panel discussion analyzing several of these opinions. Among likely subjects of discussion are the often-cited *Celotex v. Edwards and Yasparro* cases.

To sign up for the February program, please mail your $30.00 check payable to the Tampa Bay Bankruptcy Bar Association to:

Mary Schaeffer
Hill Ward & Henderson, P.A.
101 East Kennedy Boulevard, Suite 3700
Tampa, Florida 33602
(813) 222-3165
(813) 221-2900 (fax)

Additionally, all members should hold June 9th open on their calendars. On this day, our Association will hold its annual dinner in honor of Judge Baynes and his many years of service on the bench and to our Association.

CLERK'S CORNER

by Chuck Kilcoyne
Deputy-in Charge

MANDATORY ELECTRONIC FILING BEGINS MAY 1, 2005

Chief Judge Glenn was not kidding - Mandatory electronic filing by attorneys in the Tampa/ Ft. Myers Divisions is effective on May 1, 2005.

The Tampa Division CM/ECF trainers conduct classes each Tuesday and Wednesday in Tampa, and are scheduled to travel to Ft. Myers Division on February 17, 2005.

If you are interested in attending training (attorneys are required to do so in order to obtain a login and password) you, and any member of your staff must register in advance. The registration application is posted on our website at www.flmb.uscourts.gov. Please complete the form for each person attending and return it to the Clerk's office in Tampa. You will be contacted concerning available dates for training.

As you are aware, the Orlando and Jacksonville Divisions are already mandatory and a review of the electronic filing activity for the month of December 2004 reflected the following percentage of cases filed

Continued on page 6

Inside This Issue

***The Cramdown* can be accessed via the internet at www.flmb.uscourts.gov**

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CASE LAW UPDATE

-- FLORIDA'S TENANCIES BY THE ENTIRETIES -- A SURVEY OF RECENT CASE LAW

Stephen R. Leslie, Esquire
STICHTER, RIEDEL, BLAIN & PROSSER, P.A.

The United States Court of Appeals for the Eleventh Circuit recently had occasion to publish an opinion involving that strange species of real property ownership in Florida that we all know and love as the tenancy by the entireties. What follows is a brief analysis of that case, together with a survey of some cases that have discussed Florida tenancy by the entireties issues that have shown up in the case law since the Supreme Court of Florida published its opinion in *Beal Bank SSB v. Almand & Associates*, 787 So.2d 45 (Fla. 2001).

In re Sinnreich – the Eleventh Circuit speaks.

In the recent case of *In re Sinnreich,* ___ F.3d ___ (11th Cir. Nov. 30, 2004), the Eleventh Circuit held that property owned by a Chapter 13 debtor as tenancy by the entireties with his or her non-debtor spouse is not part of the bankruptcy estate under Section 541 of the Code and therefore cannot be reached by creditors, despite *United States v. Craft*, 535 U.S. 274 (2002). In the *Sinnreich* case, the Eleventh Circuit reiterated the six ownership characteristics of property owned as tenancy by the entireties:

(i) Unity of possession (joint ownership and control);
(ii) Unity of interest;
(iii) Unity of title;
(iv) Unity of time;
(v) Survivorship; and
(vi) Unity of marriage.
Sinnreich, 391 F.3d at 1298-1299, citing *Beal Bank*, 787 So.2d at 52.

The creditor in *Sinnreich* argued that the decision of *United States v. Craft*, 535 U.S. 274 (2002), provided authority for creditors or trustees to reach individualized ownership rights of a debtor with respect to entireties property in a bankruptcy administration. The *Craft* case stands for the proposition that the Internal Revenue Service has the ability to divide tenancy by the entireties property and attach a taxpayer's interest in order to satisfy tax obligations of one spouse. *Craft*, 535 U.S. at 288-89. The Eleventh Circuit in *Sinnreich* refused to extend *Craft* to a non-tax bankruptcy context due to the fact that § 522(b)(2)(B) of the Bankruptcy Code expressly provides an exemption from the bankruptcy estate for any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety to the extent that such interest is exempt from process under applicable non-bankruptcy law. The court in *Sinnreich* determined that the express exemption granted under § 522 of the Bankruptcy Code eliminated any need to consider whether the Supremacy Clause would allow the United States the right to sweep aside state-created exemptions in a bankruptcy non-tax context.

Motor Vehicles and other Personal Property

One issue that continues to surface involves the question of whether a presumption applies with respect to personal property owned by a debtor and his non-debtor spouse. Although the *Beal Bank* decision squarely addresses the issue of presumption in the context of financial accounts owned by a debtor and a non-debtor spouse, decisions are split as to whether the *Beal Bank* decision extends the presumption to other types of personal property.

In the recent case of *In re Daniels*, 309 B.R. 54 (Bankr.M.D.Fla. 2004), the Honorable Karen S. Jennemann had an opportunity to consider whether certain vehicles owned by the debtor and his wife were owned as tenants by the entirety or as a joint tenants. The vehicle titles in the *Daniels* case in one instance separated the spouses' names with hyphens (-), and in another instance the disjunctive term "or" was utilized in addition to the hyphen.

In terms of the presumption, the *Daniels* court found that the *Beal Bank* presumption of tenancy by the entireties ownership "can and should be extended to include all marital personal property, not just financial accounts." *Daniels*, 309 B.R. 54. The court found that the *Beal Bank* presumption did apply irrespective of Florida Statutes §319.22 (addressing automobile titles), and determined that the use of a hyphen did not rebut the entireties presumption with respect to automobiles. However, the use of a hyphen and the term "or" served to rebut the presumption because Florida Statutes § 319.22(2)(a)(1) specifies that when the term "or" separates the name of multiple owners on a vehicle title, a joint tenancy results, even when the co-owners are husband and wife. The court went on to note that use of the term "and" in the title would have clearly indicated ownership by the entireties.

At least with respect to a *Beal Bank* presumption in personal property other than financial accounts, a different result and rule was announced in the case of *In re McAnany*, 294 B.R. 406 (Bankr.M.D.Fla. 2003). In *McAnany*, the Honorable Jerry A. Funk determined that the presumption of tenancy by the entireties does not extend beyond financial accounts to all other types of personal property. This case involved a claim of exemption in household goods. Unlike *Daniels*, the *McAnany* court held that the presumption did not extend to physical personalty. The court sustained the trustee's objection because the debtor could not produce documentary

Continued on page 4

Continued from page 3

proof of his intention to own the tangible personal property by the entireties.

Can Entireties Properties be Used to Satisfy Creditors of One Spouse Beyond the Extent of Joint Creditors?

One issue that courts have struggled with over the years is the question of whether the existence of a single joint creditor in a single spouse case allows a trustee to administer entireties assets for the benefit of all creditors and not simply joint creditors. Courts that allowed distribution to all creditors base their decision on the concept that if an individual creditor is not allowed the extra benefit of partaking in entireties assets, then the principal of equality of distribution is violated. Courts that allowed distribution only to joint creditors base their decision on the fact that such single spouse creditors would not be able to participate in entireties assets under substantive state law. Decisions have conflicted on this issue, although a trend seems to be emerging.

Some bankruptcy courts have sided with the full distribution camp. *See, e.g. In re Planas*, 199 B.R. 211, 217 (Bankr.S.D.Fla. 1996) (Honorable A. Jay Cristol, adopting reasoning of *Amici*); *In re Boyd*, 121 B.R. 622, 624 (Bankr.N.D.Fla. 1989) (Honorable Lewis M. Killian, holding that all creditors share but only up to the amount of joint debt); *In re Amici*, 99 B.R. 100, 102 (Bankr.M.D.Fla. 1989) (Honorable Alexander L. Paskay). Other bankruptcy court decisions have determined that once nonexempt entireties property was liquidated, the proceeds were available only to joint creditors of the debtor and his non-debtor spouse. *In re Droumtsekas*, 269 B.R. 463 (Bankr.M.D.Fla. 2000) (Honorable Paul M. Glenn); *In re Monzon*, 214 B.R. 38 (Bankr.S.D.Fla. 1997) (Honorable Robert A. Mark); *In re Geoghegan*, 101 B.R. 329, 332 (Bankr.M.D.Fla. 1989). In these cases, the courts determined that entireties proceeds were not to be shared pro rata with the debtor's individual creditors. *Monzon*, 214 B.R. at 48 (also holding that a trustee should not even administer entireties property if the only joint creditor is fully secured by the property).

It seems that the United States District Courts that have addressed this issue on appeal have been uniform in holding that only debts owed to joint creditors should be satisfied from entireties proceeds. *See, e.g., In re McRae*, 308 B.R. 572 (N.D.Fla. 2003) (entireties property could be distributed only to joint creditors of both spouses); *In re Planas*, 1998 WL 757988 (S.D.Fla. 1998) (same); *In re Pepenella*, 103 B.R. 299 (M.D.Fla. 1988) (same). The trend on this issue, like the Eleventh Circuit's holding in *Sinnreich*, continues to support the entireties exemption.

Dividing Up the Tenancy

Assuming there exists enough by way of joint creditors (or the Internal Revenue Service) in a bankruptcy case to justify administration of entireties properties, how should the value of the property be split as between the two tenants? It may seem self-evident that the value would be split fifty-fifty between each spouse. However, in the recent case of *In re Murray*, _____ B.R., ____, 2004 WL 2828052 (Bankr. M.D.Fla. Oct. 13, 2004), the Honorable Jerry A. Funk determined that a fifty-fifty split was not appropriate. In the *Murray* case, the court was faced with a situation where the Internal Revenue Service successfully argued that the decision of *United States vs. Craft*, 535 U.S. 274 (2002), allowed the IRS to attach the debtor/taxpayer's rights in property owned as tenancy by the entireties. Moreover, the court was faced with the issue of determining the value of the debtor/taxpayer's interest in the property.

The *Murray* court, acknowledging the administrative convenience of using the fifty percent convention (and citing cases that use such convention), nevertheless concluded that the value of a debtor's interest in property held as a tenancy by the entireties must be determined by a reference to joint life actuarial tables. In that case, the debtor was able to procure an expert report which showed that his interest in the entireties properties was 47.23% of its current value.

This approach would naturally be appealing to those debtors who have a shorter life expectancy than their non-debtor spouse. However, other questions naturally flow from using actuarial tables, such as what value should apply in an instance where the useful or economic life of the property in question (e.g., an automobile) might be less than the actuarial life expectancy of either spouse. In addition, other issues would arise where, for example, the property in question was real property encumbered by a mortgage with a maturity that exceeded the actuarial life expectancy of one or more of the property owners. In that instance, should the mortgage be divided in half, or should division of the mortgage obligation itself by subject to actuarial analysis?

Conclusion

The never-ending, ever-changing sands of entireties law will no doubt continue to stimulate judicial interpretation, intrigue the professional, grate the single spouse creditor, and probably just perplex the average debtor.

Announcement

The Tampa and Fort Myers Divisions of the Bankruptcy court have entered a new administrative order establishing initial procedures in Chapter 11 cases. Go to http://www.flmb.uscourts.gov/Admin_Tpa.htm to pull the full administrative order.

SUPREME COURT CASE LAW UPDATE

Rousey v. Jacoway: The Supreme Court hears bankruptcy case with impact on tax and estate planning attorneys

Theresa J. Pulley Radwan[1]

On December 1, 2004, the United States Supreme Court heard arguments in the case of Rousey v. Jacoway.[2] The case will not only impact bankruptcies themselves, but also how attorneys and accountants advise clients regarding pension and retirement planning.

The debtors, a married couple, filed for Chapter 7 bankruptcy protection, claiming their Individual Retirement Accounts as exempt under sections 522(d)(5) and (d)(10)(E) of the Bankruptcy Code. The IRAs resulted from the roll-over of pension plans held through the couple's former employer, and had not been contributed to since creation of the IRAs. The trustee objected to the exemptions claimed under section 522(d)(10)(E). The bankruptcy court, bankruptcy appellate panel, and circuit court agreed with the trustee.[3]

Section 522(d)(10)(E) provides an exemption for "a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor..."[4] As noted by the Eighth Circuit, in order for a payment to qualify for exemption under section 522(d)(10)(E), three conditions must be met. First, the payment must come from a qualifying plan. Second, it must result from a qualifying condition. Finally, the payment must be necessary for debtor's support.[5] Though each of these three must be met, it is the first issue that has become central to this case.

Each of the bankruptcy court and bankruptcy appellate panel in the *Rousey* case held that an IRA is not sufficiently similar to a "stock bonus, pension, profitsharing, [or] annuity" to qualify for the exception.[6] In so deciding, the courts focused on the ability of the debtors to withdraw funds from the IRA. If the Rouseys opted to withdraw money early from their IRAs, the withdrawal would have tax consequences; nonetheless, the withdrawal was permitted.[7] The other types of plans listed generally prohibit any early withdrawal.[8]

Though the Eighth Circuit affirmed the decision of the lower courts, it disagreed with the lower courts on the issue of whether an IRA, by virtue of allowance of early withdrawal subject only to a tax penalty, was *automatically* excluded from the exemption of section 522(d)(10)(E). Agreeing with decisions of other Circuit Courts,[9] the Eighth Circuit held that, in some instances, an IRA may qualify for an exemption under 522(d)(10)(E). However, because the Eighth Circuit found that the second requirement (qualifying payment) of that Code section had not been met, and the third (necessary for debtor's support) had not been considered in the lower courts, the Eighth Circuit affirmed.[10]

Where did the other Circuits find authority for including an IRA within section 522(d)(10)(E)? In looking further into the section, subsection (E)(iii) provides an exception to exemption if a plan "does not qualify under section . . . 408 of the Internal Revenue Code of 1986."[11] Section 408 of the Internal Revenue Code provides the authority for creation of IRA accounts.[12] If IRA accounts *cannot* qualify for exemption under section 522(d)(10)(E) of the Bankruptcy Code, there would be no need to include a reference to section 408 of the Internal Revenue Code within the exceptions to the bankruptcy exemptions.[13] While the analysis of the Circuit Courts is correct, as the Eighth Circuit noted, IRA accounts

Continued on page 6

SUPREME COURT CASE LAW UPDATE

Continued from page 5

are not automatically entitled to the exemption either; had Congress meant to absolutely include (or exclude) IRA accounts into section 522(d)(10)(E) of the Bankruptcy Code, it could have done so.[14]

Assuming that the Supreme Court agrees with the Eighth Circuit and precedent from other circuits, one unanswered question remains: under what circumstances *will* an IRA qualify as a "similar" plan under section 522(d)(10)(E)? It is a question that the Eighth Circuit did not need to consider because it found that this particular IRA did not qualify for the exemption on other grounds. But the Eighth Circuit provided one clue to an answer, providing that "where an individual retirement account serves as a substitute for future earnings, Congress would probably consider it a 'similar plan or contract' . . . ."[15] It is, perhaps, the most important question left unanswered for attorneys and accountants advising clients in the creation of IRAs.

(Endnotes)

[1]Associate Dean of Academics and Associate Professor of Law, Stetson University College of Law

[2]Rousey v. Jacoway, No. 03-1407 (cert. granted June 7, 2004).

[3]Rousey, 347 F.3d at 691.

[4]11 U.S.C. § 522(d)(10)(E).

[5]Rousey, 347 F.3d at 691.

[6]In re Rousey, 275 B.R. 307, 315 (Bankr. W.D. Ark.); 283 B.R. 265, 271-72 (8th Cir. BAP 2002).

[7]Rousey, 347 F.3d at 691.

[8]Brief for Respondent, Rousey v. Jacoway, at 22.

[9]Rousey, 347 F.3d at 692, citing Dubroff v. First National Bank of Glens Falls (In re Dubroff), 199 F.3d 75 (2nd Cir. 1997); Carmichael v. Osherow (In re Carmichael), 100 F.3d 375 (5th Cir. 1996); Dettman v. Brucher (In re Brucher), 243 F.3d 242 (6th Cir. 2001); Farrar v. McKown (In re McKown), 203 F.3d 1188 (9th Cir. 2000).

[10]Rousey, 347 F.3d at 693.

[11]11 U.S.C. § 522(d)(10)(E)(iii).

[12]26 U.S.C. § 408.

[13]Rousey, 347 F.3d at 692, citing Patterson v. Shumate, 504 U.S. 753, 762-63 (1992); Dubroff , 199 F.3d at 78; Carmichael, 100 F.3d at 378; Dettman, 243 F.3d at 243; Farrar, 203 F.3d at 1190.

[14]Rousey, 347 F.3d at 692.

[15]Rousey, 347 F.3d at 692.

Clerks' Corner

Continued from page 1

by ECF – Jacksonville Division 79.66%; Orlando Division 80.92%, while the Ft. Myers Division 47.26% and Tampa Division was only 20.90%.

We still have a large number of attorneys to train in this Division, so please don't wait until the last minute to register.

One of the many benefits of being an Electronic Filing User is being able to submit proposed orders through e-mail to the appropriate Judge's team in the Clerk's office, allowing those orders to be processed much more promptly. All Electronic Filing Users have received an E-mail with the address information and guidelines for submission.

TBBBA TECHNOLOGY REPORT

CM/ECF: VIEWS FROM THE TRENCHES (Part II)

By: Cheryl Thompson, Esquire
GrayRobinson, P.A.

In view of the upcoming May 1, 2005 deadline, at which time electronic filing will become mandatory in the Middle District, the Technology Committee asked the CM/ECF trainers some questions about the training required to obtain an attorney ECF password. Here are the responses:

1. What will the participant know after completing the training?

CM/ECF training is designed for attorneys who represent debtors and creditors in bankruptcy cases and proceedings. The class provides practical experience using the CM/ECF system. Upon successful completion of the class, the attorney will be able to:

- Use an internet browser to access ECF
- File a Chapter 7 and Chapter 13 case (Debtor's attorneys only)
- Upload a creditor's matrix
- File documents
- File a proof of claim
- Open an adversary proceeding
- Review and research information using CM/ECF reports

2. How long is the training and how often is it offered?

Currently, training classes are held on Tuesdays and Wednesdays on the 8th floor of the Bankruptcy Court. Each week, the Debtor's Attorney Class and the Creditor's Attorney Class alternate days. Additional training days will be added if needed as the May 1, 2005, deadline for mandatory electronic filing approaches.

The class begins at 9:00 a.m. and generally ends around 12:00 - 12:30 p.m. The length of class depends on the amount of questions and interaction from the participants. Questions are strongly encouraged because the participants leave with a better understanding of the system.

3. What is the procedure to sign up for training?

An attorney practicing in the Middle District of Florida can register for CM/ECF training in two ways. The attorney can register by phone, by calling Sara Mason, at 301-5079. Alternatively, the attorney can register electronically by completing the ECF Training Registration Packet which can be obtained from the court's website at www.flmb.uscourts.gov (Click CM/ECF (left column) and then Registration Requirements) and mailing it to the address on the form. Upon receipt of the form, Sara Mason will contact the attorney's office to schedule a training class. Attorneys are encouraged to sign up early to ensure space availability as each class holds a maximum of 10. Registered participants are asked to contact one of the trainers at least 24 hours in advance of their scheduled class if they are unable to attend, so that the trainers can accommodate others wishing to attend that class.

4. Who can or should attend the CM/ECF training?

All attorneys wishing to participate in electronic filing are required to attend class and must also be admitted to the Bar of the U.S. District Court for the Middle District of Florida. Even though logins and passwords are issued only to the attorneys and not to their staff, staff members are welcome to attend.

5. What topics are covered in the Debtor's and Creditor's attorney classes?

TOPICS COVERED IN DETOR ATTORNEY CLASSES:

- Use of the internet browser to access ECF
- Court's website

Continued on page 27

BANKRUPTCY PRIMER AT DOWNTOWN STETSON CAMPUS

On Saturday, November 13, 2004, Stetson University College of Law presented its annual Primer on Bankruptcy to 70 lawyers, paralegals and legal assistants.

The seminar took place at Stetson's new downtown Tampa facility. Alexander L. Paskay, Chief Bankruptcy Judge Emeritus of the Middle District of Florida and a Stetson University College of Law adjunct professor, served as moderator.

This annual seminar provides a concise introduction to bankruptcy law and procedure. It is of particular relevance to paralegals and legal assistants in bankruptcy practices and to lawyers who are unfamiliar with bankruptcy court procedures.

Paul M. Glenn, Chief Judge of the Bankruptcy Court for the Middle District of Florida, spoke on consumer bankruptcy issues and ethical problems. Bankruptcy Judge K. Rodney May, presented an overview of bankruptcy law and practice. Charles G. Kilcoyne, Deputy-in-Charge of the Bankruptcy Courts Tampa Division, gave an overview of court and clerk procedures in the Tampa and Ft. Myers divisions.

STETSON UNIVERSITY COLLEGE OF LAW DUBERSTEIN BANKRUPTCY MOOT COURT COMPETITION PRACTICE JUDGES NEEDED

A team of students from the College of Law will compete at the annual Duberstein Bankruptcy Moot Court Competition in March 2005. Members of the Tampa Bay Bankruptcy Bar Association have been instrumental in the success of prior teams through judging of practice rounds. If you can spare two hours of time to help the team prepare for competition, please contact:

Associate Dean
Theresa Pulley Radwan at
radwan@law.stetson.edu or (727) 562-7361

Practice rounds run from February 2 through March 11, and can be in St. Petersburg or Tampa. Practice sessions are currently scheduled for Sunday and Monday afternoons and Thursday evenings. Thank you for your help!

HIGHLIGHTS FROM TBBBA OCTOBER LUNCHEON

THE TAMPA BAY BANKRUPTCY BAR ASSOCIATION
2004-2005
Committee Chairs

The Association is looking for volunteers to assist us this coming 2004-2005 year. If you are interested in getting more involved with the Association or one of the Standing Committees, please contact any one of the Association officers or the Chairpersons listed below.

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THE TBBBA WELCOMES JON M. WAAGE TO TAMPA BAY!

Due to the large volume of cases in the United States Bankruptcy Court for the Middle District of Florida, the duties of the Chapter 13 Trustee in our area are being shared by Terry E. Smith and Jon M. Waage. Effective as of October 1, 2004, Terry E. Smith serves as Standing Chapter 13 Trustee for active cases assigned to Judges Glenn, Williamson and May, and Jon M. Waage serves as Standing Chapter 13 Trustee for active cases assigned to Judges Paskay and Baynes and for all active cases in the Ft. Myers Division.

Mr. Waage comes to Tampa from North Texas which he called home for the past 17 years. Mr. Waage graduated with honors from Drake University Law School in Des Moines, Iowa, shortly after which he moved to Texas to practice law with his brother, Waage & Waage, LLP. He is a member of both the Iowa and Texas state bars. Mr. Waage is board certified in both business and consumer Bankruptcy law by the Texas Board of Legal Specialization. In addition, he has been a member of the Texas Board of Legal Specialization Bankruptcy Law Exam

Continued on page 16

COMMENT

GIVING THE SECURED CREDITORS THEIR DUE (PROCESS)

Larry M. Foyle, Esquire
Kass, Shuler, et al., P.A.

Secured creditors in chapter 13 bankruptcy cases may feel (with apologies to Rodney Dangerfield) that they "get no respect."[1] Part of the perceived lack of respect may be rooted in the fact that courts have continued to reinterpret what Congress likely intended to be uniform with respect to treatment of secured claims. As an example, consider the decisions of the various bankruptcy, district and circuit courts both before and after the Supreme Court's Rash and Till decisions regarding such substantive areas as cramdowns and interest rates.[2] This inconsistency and conflict respecting substantive issues can be very disconcerting to secured creditors in chapter 13 as they attempt to establish procedures and metrics for dealing with cases on a national or regional basis. More importantly, however, secured creditors sometimes feel that they do not receive procedural due process in the conduct of chapter 13 cases. Actual or perceived lack of procedural due process can have an effect that undermines the bankruptcy system.[3]

Adequate notice is a fundamental requirement of procedural due process. This requirement is a constitutional requirement as well as a statutory one. It should be noted that the "(c)onstitutional requirements for the adequacy of notice are not necessarily the same as statutory requirements".[4] The bankruptcy code and rules provide for notice and also contain a number of limitations on notice. The bankruptcy code section 102 defines "Notice and a Hearing" [11 U.S.C. §102(a) and (b)] as:

> (a) (notice and a hearing)…means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
> (b) authorizes an act without an actual hearing if such notice is given properly and if—
> (i) such a hearing is not timely requested by a party in interest; or
> (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act.

The "appropriateness" requirement of this definition gives bankruptcy courts wide discretion in tailoring notice in those situations where the bankruptcy code or rules do not prescribe specific notice requirements.

Continued on page 12

Continued from page 11

Bankruptcy courts seem to have permitted some due process formalities to erode in the name of expedience, perhaps because of ever-increasing caseloads.[5] This erosion adversely affects secured creditors' due process rights. "Negative notice" procedures with abbreviated response deadlines are commonly used in matters pertaining to valuation of collateral, lien avoidance and objections to claims. Courts often do not require formal adversary proceedings for matters pertaining to the extent, validity and priority of liens and sales free and clear of liens, even though these matters generally require an adversary proceeding according to Rule 7001.

The due process problem for secured creditors is especially acute in Chapter 13 proceedings because of the "claim vs. plan" conundrum. In some jurisdictions, the claim controls and absent an objection must be allowed as filed.[6] Some might refer to this practice as "fire and forget". In such jurisdictions, the debtor has the duty to make separate or independent challenges in the form of objections to effect the claim's allowance or status. Other jurisdictions have held that the chapter 13 plan is controlling and it is incumbent upon the creditor to challenge the terms of the plan or face its consequences.[7]

Recognizing that the playing field in the chapter 13 case may be tilted in favor of debtors for policy reasons, it is still astounding to see what some courts have done to secured creditors concerning due process in the "gray zone." The gray zone is that murky area which is not precisely covered by the bankruptcy code or the rules and is instead left to the rulemaking authority of the local bankruptcy courts. Ultimately, it will have to be the case law decisions of the district and circuit courts that must determine what is fair and appropriate in the gray zones of due process.

When courts elevate efficiency over the due process afforded secured creditors, it may be time to take a step back and ask, why. Judicial process has always favored decisions on the merits and disfavored defaults. So, why is it that in some courts, chapter 13 plans become traps for the unwary, which sacrifice secured creditors' rights in favor of efficiency and finality?[8] More specifically, why is there such a great rush to judgment in those courts in which chapter 13 plans are confirmed very early in the case, oftentimes before the claims bar date has even passed?

I suggest that the lack of due process afforded secured creditors, while defensible under the local rules in such courts, is unfair and in many circumstances completely unnecessary. I also suggest that the abbreviated time frames for negative notice response deadlines in our local courts for contested matters pertaining to valuation of collateral, lien avoidance, objections to claims and the like should be expanded to 30 days.[9] Such expansion to 30 days would be consistent with typical time frames accorded a party to answer a complaint in an adversary proceeding. An expansion to 30 days would likely lead to disputes being resolved on the merits with fewer ended by default.[10]

The Eleventh Circuit's Bateman Decision

In a previous issue of the Cramdown, I applauded the Eleventh Circuit Court of Appeals in its Bateman decision.[11] The Eleventh Circuit did some "big-picture" thinking and determined that a secured claim for mortgage arrearages would trump and thereby control the terms of a Plan in which the debtor proposed a different arrearage cure amount. More importantly, based upon the cases cited in Bateman, it appeared perhaps, that the claim vs. plan conundrum could be resolved in favor of secured creditors and require certain due process minimums be afforded to secured creditors. The Bateman decision acknowledged the chapter 13 plan's res judicata effect did not control the claim issue in this respect.[12]

What may be most important about Bateman is the court's consideration of due process.[13] The Bateman court criticized the bankruptcy courts' practices in which chapter 13 plans are prematurely confirmed.[14] In addition, the Eleventh Circuit stressed the need for due process in Chapter 13 cases. Many commentators may disagree and seek to limit Bateman to a very narrow fact pattern involving a claim for real estate mortgage arrearages that does not draw an objection from the Debtor and the trumping effect that such claim has over a plan which provides a contrary treatment of the claim. Others may see Bateman in a much broader light, a light that the Eleventh Circuit likely intended in its decision. If one carefully reads Bateman, it is inescapable that it is a tutorial on many aspects of general bankruptcy law and practice. The opinion paints with a broad brush and its writing style suggests that Bateman may have broader implications than some courts perceive.

Judge Mark's Sernaque Decision

Recently, Judge Mark of the Southern District, Miami Division, decided the case of Sernaque.[15] This case seeks to distinguish and limit Bateman's applicability. The facts in Sernaque, are as follows: the debtor filed a plan proposing to strip off a junior lien.[16] The secured creditor filed a fully-secured claim. Each party took the position that it was incumbent upon the other to take some action. According to the secured creditor, the debtor would have to challenge the allowance or secured status of the claim. According to the debtor, the secured creditor would have to object to the plan or be bound by its terms. The debtor did nothing. There was no motion or adversary proceeding to challenge the extent, validity, or priority of the creditor's lien. Moreover, the debtor filed no objection to the

Continued on page 13

Continued from page 12

claim and did not file a motion to determine the value of the collateral. The debtor took the position that a simple statement in the plan was sufficient to bind the creditor to the plan's terms. The creditor did not object to the plan. Given the abbreviated practices of the Southern District's bankruptcy courts, the plan was confirmed shortly after the meeting of creditors and before the claims bar date had passed. At issue ultimately was whether the debtor's simple statement in the plan that the secured creditor's claim be "valued at $0.00" was controlling. The debtor, after confirmation, sought an Order determining that the valuation set forth in the plan was binding and that the debtor was entitled to an order in recordable form providing that creditor's lien was stripped off the homestead real property. A contest erupted between the parties and the secured creditor filed a motion for summary judgment opposing debtor's requested relief.

Judge Mark held that Bateman was not controlling because the amount of the claim was not in issue. Judge Mark's conclusion to limit Bateman was based upon the Sernaque's plan treatment proposing a mortgage lien "stripoff" by valuing the secured claim at $0.00 in the plan. As a result, Judge Mark determined that the claim itself was not central to the dispute, rather it was the lien and the value of the property that was in question. The end result in Sernaque was that a secured claim, which never drew an objection, would only be allowed as an unsecured claim pursuant to the confirmation of the plan.[17]

While the Sernaque decision states that due process is important, the opinion is more of an apologetic for the minimalist process that had been followed in the Southern District of Florida whereby Chapter 13 plans are confirmed early in the cases, usually while the creditors are silent, or sleeping in their objections. As a result, all sorts of matters can be set forth and dealt with in the plan and be considered as part of the confirmation process. Quite simply, allowing a debtor to "hoodwink" a secured creditor in an early confirmation jurisdictionis a bad idea and needs to be reexamined for a number of reasons.[18] In fairness to the Southern District's procedures, that court now has implemented rule changes that require that debtors file a separate motion to value (or strip-off) the lien of a secured creditor[19] and require that the Debtors must serve these motions in accordance with the service of process requirements under Rule 7004.[20]

Courts should be loathe to resolve disputes on a surprise or default basis. If there exists a fair and viable means to protect the rights of all parties and promote dispute resolution on the merits, then courts should consider the means best calculated to promote such policies. Many courts have examined the lien stripping process and have reached conclusions respecting how the process should be accomplished. Almost all courts, for reasons that remain unexplained, have determined that Rule 7001 is not implicated in the process.[21] Other courts have recognized that although an objection to claim may be a means of attacking the value of its secured portion, such claim objections are not actually necessary. For those courts the amount of the allowed claim, as opposed to whether the claim is secured or unsecured are different issues. Those courts recognize that the outcome of other contested matters and proceedings in the case may impact the secured status of the claim.

This leaves for consideration the two other methods courts have used for determining the allowed amount of a creditor's secured claim and determining the remaining balance that is unsecured. The motion to determine secured status (aka motion to value collateral) is one method. The other method is to have the amount of a creditor's secured claim determined through the plan process.

In the Sernaque case the Court concluded that support exists for its local practice of lumping many matters into the plan confirmation process[22] provided there are safeguards to ensure due process to affected creditors. The debtor has to show that there has been strict compliance with the service requirements of the plan under applicable rules. The problem with the court's analysis is not necessarily that its decision is wrong, but that the court seems more concerned with maintaining the validity of a process flawed from its inception than in affording appropriate due process to the secured creditors.

In many courts, a debtor files a chapter 13 case and the court sends out the notice using the debtor's matrix of addresses and provides a date for a meeting of creditors. In the Southern District of Florida, a secured creditor must lodge its objection to the plan at or before the meeting of creditors.[23] If the secured creditor does not file such an objection, the plan is likely to be confirmed with determinations made that are adverse to the secured creditor's interests. Because the meeting of creditors is held somewhere between 20 and 45 days after the case is filed, a creditor is not given much time to gain necessary information, hire counsel in the case or otherwise meaningfully participate. Moreover, the arbitrary nature of the local rule in effect often forces creditors to attend the creditor's meeting to voice the objection and participate, when such attendance otherwise may do little, but add time and expense which the creditor may not be able to recover.

Under Rule 3002(a) and (c) and Section 501, if claims are required to be filed, they are to be filed by the claims bar date. Part of the irony is that secured creditors are not even required to file claims in chapter 13 cases.[24] The normal bar date for filing claims is 90 days after the first date set for the meeting of the creditors. Most courts agree that late-filed claims cannot

Continued on page 14

Continued from page 13

be allowed in chapter 13 cases. Section 501(c) provides, however, that if a creditor does not timely file a claim, the debtor or trustee is given the opportunity to file a claim on the creditor's behalf. This may become important in the final analysis because several cases have held that in order to value a claim under Section 506, there must first be a claim on file to value. Therefore, it would seem that one cannot value a secured creditor's claim, unless a claim has actually been filed and allowed.[25] It should logically follow that a local rule should not be promulgated and then defended providing for the plan confirmation process to conclude important secured creditor rights. When that process occurs before the claims bar date has passed, it is particularly unsettling from a fundamental fairness perspective. It prematurely permits the plan to act as the valuation mechanism when claims might not have been filed, or might still be amended within the claims bar date. Though the point was moot in Sernaque, (the creditor's claim was filed prior to confirmation), it should be self evident that an early confirmation process is flawed, particularly when the plan itself is used as the mechanism to determine the value of collateral and stripoff liens. One may continue to wonder what would be the result if the secured creditor never had filed its "secured" claim in Sernaque.

Conclusion

The Bateman decision has apparently not answered the claim vs. plan conundrum. It is difficult because "one size will not fit all" jurisdictions within the Eleventh Circuit. Some courts may seek to distinguish the Bateman case and find it provides wiggle room to determine that in several instances the claim does not control. If Bateman is to so be narrowly interpreted and if it merely pertains to the issue of a claim for mortgage arrearages on a debtor's primary residence, then the Eleventh Circuit wasted a lot of ink explaining that proposition and discussing basic notions of due process in chapter 13 cases. If the Court intended to limit the decision's application to other cases, it could have simply said that Nobelman, and Section 1322(b)(2) "mean what they say they mean" when the collateral involved is a home mortgage. It is submitted that Bateman, was intended to transcend such a limited issue and, for reasons of due process, limits the power of courts that gloss over secured creditors' due process rights. Secured creditors should insist that their voices be heard and object to plans in cases in which their interests are being affected or attempted to be affected without due process protections. Courts should take a more proactive position and prevent plans from being approved in which the provisions violate notions of fair play and clearly whenever the plan violates section 1322(b)(10).[26] Due process is driven by notice. Notice is best provided to the secured creditor when there are separate objections, separate contested matters and separate adversary proceedings dealing with discreet issues.[27] Each of those kinds of matters is required to be served upon the secured creditor in accordance with Rule 7004. Since there is no need to rush to judgment and since there is finality with respect to plan confirmation, courts should not prematurely confirm plans. Moreover courts should consider extending the time frames secured creditors are given to respond (in negative notice situations) to 30 days and promote dispute resolution on the merits. Plans that act as "trap doors" for the unwary should be disfavored. In the future, courts should consider adopting model plans and adopt a rules check list or use a pre-confirmation affidavit procedure that requires independent actions such as valuation of collateral, objections to the plans and the like be completed before the case ever comes up for confirmation. The secured creditors, like all parties in the process, deserve respect.

[1] While it is true that secured creditors' claims may significantly impact the ability on the part of the Trustee to distribute assets to general unsecured creditors, this seeming inequality among creditor groups is a reality. Outside of bankruptcy, secured creditors are a force to be reckoned with when it comes to lien enforcement and collection of amounts due. Once in the bankruptcy court, however, enforcement rights can be postponed (i.e. the automatic stay), limited (i.e. valuation) or even eliminated entirely (i.e. strong arm powers, preference issues, lien strip-offs, lien avoidance etc.)

[2] Lack of uniformity is evident in the opinions of the Bankruptcy Courts, District Courts and Circuit Courts published both before and after the decisions of the United States Supreme Court in cases such as **Rash** and **Till** with respect to cramdown valuation (some use the Blue Book, the NADA, or live witnesses) and the interest to be paid on deferred payments to a secured creditor under the Plan. There were at least 4 distinct methods of determining an interest rate addressed in **Till**. Subsequent to the decision no one knows how many variations on the theme of interest may result. One will have to determine the base rate to use, and the nature of the risk factor to impose.

[3] This column will deal with the idea that although something may be supported by a local rule, it may not be perceived as fair.

[3] In re Center Wholesale, Inc., 759 F.2d at 1448. [The following text is quoted in its entirety from the text in footnote one (1) from the court's opinion in In re Blumer, 66 B.R. 109, 113 (Bankr. Fed. App., 1986)] "The due process clause of the Fifth Amendment requires that due process be provided before property can be taken. It has been argued that the Fifth Amendment does not provide an independent source of limitation on the substantive scope of the bankruptcy power. Rogers, "The Impairment of Secured Creditors Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause," 96 Harv.L.Rev. 973, 997 (1983). Accord, Jackson, "Avoiding Powers in Bankruptcy," 36 Stan.L.Rev. 725, 736 n.29

Continued on page 15

Continued from page 14

(1984); Baird and Jackson, "Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy," 51 U.Chi.L.Rev. 97, 100 n.14 (1984). However, the Supreme Court has held that the bankruptcy power is subject to the Fifth Amendment. United States v. Security Industrial Bank, 459 U.S. 70, 75, 74 L. Ed. 2d 235, 103 S. Ct. 407 (1982)." In a judicial proceeding, due process requires that individualized notice be given before rights can be affected. Texaco, Inc. v. Short, 454 U.S. 516, 534-35, 70 L. Ed. 2d 738, 102 S. Ct. 781 (1982); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950). The Supreme Court has found that the fundamental requirement of due process—the right to be heard—is meaningless without notice: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314.

[4] It is only in the last year that the trend of higher numbers of cases nationwide has started to level off, or decline.

[5] The bankruptcy courts in the Middle District of Florida have generally followed bankruptcy code section 502(a) and determined that the claim controls the plan.

[6] The plan is paramount in the Southern District of Florida bankruptcy courts.

[7] See H. Hildebrand Toward a More Perfect Plan, ABI Journal Feb. 1, 2003.

[8] The time frame for a response to Motion to lift stay must by necessity remain shorter than 30 days because of statutorily-imposed time limitations of Section 362(e) of the Bankruptcy Code.

[9] Having represented a number of secured creditors with central offices in distant locations, the logistics of getting a notice, matching it up with the account debtor, getting it to local counsel and the like can often take a significant amount of time and results in many secured creditors missing opportunities to contest matters on the merits.

[10] In re Bateman 331 F.3d 821 (11th Cir. 2003)

[11] The Eleventh Circuit makes it quite clear that the plan has res judicata effect.

[12] Bankruptcy courts, such as the Tampa Division of the Middle District of Florida, which promote claims analysis require that potential disputes set forth in Plans also be addressed and dealt with by separate objections, motions and adversary proceedings in order to afford creditors due process protections.

[13] Unlike the bankruptcy courts in the Tampa Division, which have historically delayed confirmation until after the claims bar date has expired, contested issues have been resolved, and the Debtor has established a track record of preconfirmation payments, many other bankrupty courts confirm Chapter 13 plans shortly after the creditors' meeting with none of these safeguards established.

[14] In re Sernaque 311 B.R. 632 (B.S.D. Fla. 2004)

[15] The 11th Circuit has approved strip offs of wholly unsecured liens on a debtor's residence in chapter 13 cases. See In re Tanner, 217 F.3d 1357, 1359 n.5 (11th Cir.2000). But see, **In re** Dickerson, 222 F.3d 924 (11th Cir. 2000) in which the later panel of the same court respectfully followed the prior panel precedent rule, and permitted a stripoff, but stated "[H]owever, were we to decide this issue on a clean slate, we would not so hold". The United States Supreme Court has ruled that strip downs of mortgages on a debtor's primary residence are prohibited in Chapter 13 cases. One has to perhaps intellectually "wink" to accept the notion that the two concepts (stripoffs and stripdowns) are somehow different.

[16] The court decision takes an unusual twist in that the court finds the local procedures of valuing through the plan valid, but leaves open the issue respecting whether service of the plan was proper. If improper under rule 7004, the valuation and resulting lien stripoff would be invalid. That dispute was left for another day.

[17] In the Southern District bankruptcy cases are confirmed shortly after the meeting of the creditors is held.

[18] See the Southern District Bankruptcy Court's local rule 3015-3(A) Chapter 13 Confirmation. At the time of Sernaque, this rule was not in place and a separate motion to value was not required. It is likely that the Sernaque's plan was simply served on the creditors as part of the ordinary matrix which oftentimes consists of simply sending notice to a lockbox or other place where payments are made to the creditor. Such mailrooms are often ill-equipped to deal with important legal notices and motions that are not addressed to any particular person.

[19] Service under Rule 7004 has some very important built in safeguards respecting service. Such service is designed to provide the best means available by US Mail to insure that the mail actually is brought to an appropriate party's attention by requiring the mail be addressed to a particular person or title of such person such as the "president" in accordance with the service requirements of the local state's service of process requirements.

[20] Rule 7001 requires that there must be an adversary proceeding to determine the extent, validity or priority of a lien. Even though lien stripping must certainly involve some aspect of determining the extent or the validity or the priority of a lien, the court simply winks at this Rule.

[21] See In re Calvert, 907 F.2d 1069 (11th Cir. 1990), see also See also In re Duggins, 263 B.R. 233 (B.C.D. Ill. 2000) and In re Hudson, 260 B.R. 421, 437-38 (B.W.D. Mich. 2001)

[22] "The debtor may establish value of collateral securing certain claims in the original plan as filed, the plan will be deemed a 'Motion to Value Collateral Under 11 U.S.C. Section 506' and will establish the extent of the secured claim unless **and objection is filed . . . before the meeting of creditors.**" (emphasis added) Sernaque 311 B.R. @ 635.

Continued on page 16

COMMENT

Continued from page 15

[23] In re Bateman, supra @ 827 "Inclusion of creditors for disbursements under a Chapter 13 plan is not an automatic process. If the debtor wants to be discharged of certain liabilities, then the debtor must list the claim amounts and their proposed treatment under the plan. Correspondingly, if a creditor wants to ensure it will be provided for in the confirmed plan, it will file a proof of claim. 11 U.S.C. § 502." "Although the filing of a proof of claim may be a prerequisite to the allowance of certain claims, no creditor is required to file a proof of claim ... [but one] should be filed only when some purpose would be served." *Simmons v. Savell,* 765 F.2d 547, 551 (5th Cir.1985)

[24] Section 506 provides: "An allowed claim of a creditor . . . is a secured claim to the extent of the secured creditor's interest in the debtor's interest in such property . . . ." The implication is, that absent a filed claim, the court can take no action under Section 506. Sections 1322 and 1325 refer to providing for and dealing with claims. These sections do not provide for determining values. Courts that permit valuation to occur pursuant to the Plan ignore the fact that the court's analysis and power to value begins with section 506. Providing valuations as part of the plan process is really only important because the reason for the valuation can determine the kind of valuation one is likely to obtain (retail, wholesale, etc). The plan, however, is not necessarily the means, or method by which the value occurs. There still should be a separate motion filed and served apprising the secured creditor with due process that important rights may be affected. Section 506 says "and in conjunction with any hearing [506 hearing?] on such disposition or use or on a plan affecting such creditor's interest. . . .". It may be splitting hairs, but the statute does not indicate that it is the Plan that is the mechanism to value the property, rather it is section 506 that provides the mechanism and suggests there must first be an allowed claim to value.

[25] Some favorite provisions in Plans come to mind: Plans that attempt to discharge coobligors (violating section 524(f); attempts to discharge student loans or achieve a hardship discharge (violating 523(a)(8); attempts to tender collateral to the secured creditor in full satisfaction of a debt (there is no nexus between collateral and debt, they are not mutually interchangeable concepts unless the collateral is the indubitable equivalent in value to the debt).

[26] Those who oppose the idea of "more" due process, likely do so based upon issues of expediency, or courtroom efficiency, rather than on due process grounds.

JON M. WAAGE

Continued from page 10

Commission and a Texas Board of Legal Specialization Bankruptcy Law Examiner since 2003.

Throughout his 18 years of practice, the past 14 of which have been devoted to bankruptcy, Mr. Waage has been involved in Chapter 7, 11 and 13 cases, mostly representing debtor clients. He also has been a guest lecturer for such organizations as The State Bar of Texas, and the DFW Area Chapter 13 Consumer Bankruptcy Conference, speaking on such topics as exemptions, communications among debtor attorneys and creditors, electronic filing, as well as Chapter 7, 11, and 13 overviews.

Mr. Waage brings with him a wealth of experience and a new perspective which will only benefit our bar. For instance, electronic filing is in full swing in the bankruptcy courts of Texas. He sings the praises of going electronic and looks forward to the time when our district is completely electronic as well. In addition, he is currently getting acquainted with our local practices and procedures.

One matter on which Mr. Waage is focused involves Rule 2016(b) statements. Pursuant to §329 of the Bankruptcy Code and Bankruptcy Rule 2016(b), debtor's counsel is required to disclose fees paid or to be paid for services rendered or to be rendered in connection with the bankruptcy case. In addition, debtor's counsel is required to file a supplemental statement for any payment or agreement not previously disclosed. In short, both before and during a Chapter 13 case, debtor's counsel needs to disclose compensation paid or agreed to be paid. Mr. Waage will be paying attention to this issue.

Outside of the practice of law, Mr. Waage is an avid runner having completed approximately 60 marathons, including five Boston Marathons and the New York, Chicago, and San Francisco marathons. He has also completed several mid- to long-distance bike rallies and has competed in several triathlons and adventure races.

Mr. Waage has enjoyed meeting the judges and attorneys of our bar and appreciates everyone's hospitality. The TBBBA encourages everyone to introduce themselves to Jon Waage at the next luncheon or when at the courthouse. Again, we welcome Mr. Waage and look forward to working together.

COMING SOON

New TBBBA membership directory. If you have not done so already, please forward your membership application and payment to Carrie Beth Baris, P.O. Box 1303, Tampa, FL 33601. In addition, if you have any changes from the old directory, please email those changes to Carrie Beth Baris at cbaris@bushross.com. Thank you.

CALENDAR OF EVENTS

Event	Date	Location
Judge Baynes: The Man, the Legacy	February 15, 2005	Hyatt Downtown
Florida Bar Half Day Seminar Evidentiary and Appellate Considerations	March 16, 2005	Hyatt Downtown
CLE Luncheon Program Clerk's Office Program	April 13, 2005	Hyatt Downtown
CLE Luncheon Program Turnaround Issues	May 12, 2005	Hyatt Downtown
Eleventh Circuit Judicial Conference	May 11-May 14, 2005	Diplomat Hotel, Hollywood
Annual Dinner	June 9, 2005	Palma Ceia Golf & Country Club
Florida Bar Annual Meeting Federal Court Practice Committee Roundtable	June 23, 2005 2:30 p.m.-5:30 p.m.	Orlando World Marriott

2004 FLORIDA EXEMPTION CASE LAW UPDATE

by Dennis J. LeVine, Esq., Dennis J. Levine & Associates, P.A.

Several important cases were decided in both the federal and state courts in 2004 interpreting Florida's exemption laws. This article summarizes the holdings of these cases.

HOMESTEAD

In **In re Ballato**, 2004 WL 2786647 (Bankr. M. D. Fla. 2004), a pre-petition divorce decree directing homestead property to be sold, and the sale proceeds to be distributed between the debtor and his wife, did not result in an "abandonment" of debtor's homestead exemption. The Court held that the entry of a divorce decree, which changed debtor-husband's ownership interest in homestead property from tenancy by the entirety to tenancy in common, did not operate to eliminate or invalidate the homestead exemption.

While the homestead is generally exempt from judgment creditors, several Florida Courts have recently used equitable liens to enforce claims against the homestead when the

Continued on page 19

View from the Bench Seminar: 2004

The first CLE program that I attended as a brand new attorney clerking for the Honorable C. Timothy Corcoran, III, was the View from the Bench seminar. It's not important how long ago that was, suffice it to say that I knew little about the law and less about the bar and the bench of Florida. Even so, that seminar made an indelible impression and convinced me that I was surrounded by awesome legal talent.

Throughout the years, that fact has become abundantly clear and the View from the Bench seminar has been an excellent showcase for the legal efforts of the bar and the bench. The attendees receive materials that comprise substantially all of the relevant opinions on every topic related to the practice of bankruptcy law. The attendees also get a public view of the collegiality and intellectual sparring that occurs behind the scenes amongst the judges. Best of all, the attendees have a rare chance to hear directly from the judges about the sub rosa issues that impact and affect the decisions that are rendered.

As if this weren't enough, in recent years an entertainment quotient has been added. Last year, Judge Mark wowed the attendees with his song expressing his predictions about the

Continued on page 26

2004 FLORIDA EXEMPTION

Continued from page 18

homestead is purchased with funds tainted by fraud. In **In re Hecker**, 316 B.R. 375 (Bankr. S. D. Fla. 2004), funds used by a debtor to purchase a homestead were traceable to funds that the debtor fraudulently obtained from a creditorÜ . Accordingly, the property was subject to an equitable lien in favor of the creditor and, therefore, was not exempt. Moreover, the fact that the real property was acquired by the debtor and his spouse as husband and wife did not protect it from the claim of an equitable lien or otherwise preserve any exempt status. *See also* **In re Chauncey**, 308 B.R. 97 (Bankr. S. D. Fla. 2004); and **Financial Federated Title & Trust, Inc.**, 347 F.3d 880 (11th Cir. 2003).

In **In re Yettaw**, 316 B.R. 560 (Bankr. M.D. Fla. 2004), the debtor lived in a Winnebago motor home, which he had at a motor home park. The Court considered six (6) criteria to determine whether "nontraditional abodes" constituted an exempt homestead. Ultimately, the Court found that the debtor's motor home was a "dwelling house" entitled to homestead status under the Florida Constitution.

In **Davis v. Davisa** , 864 So.2d 458 (Fla. 1st DCA 2004), the Court ruled that, unlike the limitation for homestead inside of a municipality which is limited to a residence, property outside of a municipality constituting a homestead (up to 160 acres) can include a business located thereon.

PENSION PLANS AND IRAS

In **In re Blais**, 2004 WL 1067577 (Bankr. S. D. Fla. 2004)(not reported in B.R), the debtor's profit sharing plan failed to qualify under the literal requirements of I.R.C. § 401(a) because of the manner in which the plan was operated. Here, the Profit Sharing Plan failed to comply with a variety of qualification requirements imposed by the IRC and related regulations (e.g. the debtor borrowed and failed to repay substantial portions of the plans' funds). As a result, the Court held that the Plan did not qualify under 26 U.S.C. § 401(a) and, therefore, was not exempt under Florida Statute § 221.21. Accordingly, the Plan was deemed property of the estate and subject to administration by the Trustee.

WORKERS COMPENSATION AWARDS

In **In re Harrelson**, 311 B.R. 618 (Bankr. M. D. Fla. 2004), the Court held that workers' compensation benefits in the hands of an injured worker which are exempt from the claims of her creditors did not lose their exempt character simply because the worker

Continued on page 21

HIGHLIGHTS FROM TBBBA HOLIDAY PARTY

PRE-BANKRUPTCY INSOLVENCY PLANNING MAY JUSTIFY SEPARATE FEE IF REASONABLE AND DISCLOSED

By Catherine Peek McEwen

Services for pre-bankruptcy insolvency planning may be charged for separately and need not be included in a pre-petition retainer for a subsequent bankruptcy filing. The fee for insolvency planning may be set by hourly rate or a flat fee, but it must be reasonable and must be properly disclosed by the lawyer if the client later files a bankruptcy using the same lawyer. These propositions are the upshot of a recent ruling by Chief Judge Paul M. Glenn in *In re Trembath* (Case no. 03-08630-8G7).

The fee-related issues determined by Judge Glenn in the case arose in connection with a motion by the U.S. Trustee to examine fees charged by the debtors' lawyer. One of the issues was whether the lawyer's separate, flat fee for insolvency planning services was reasonable. The lawyer charged a flat fee of $1,000 to cover advice relating to three assets that could ostensibly be subject to a trustee's administration in the event of a Chapter 7 bankruptcy filing. The flat fee also covered future services, if necessary, such as responding to pre-bankruptcy creditor demands.

The debtors eventually filed a Chapter 7 bankruptcy, for which the same lawyer charged an additional $1,000 flat rate fee. In other words, the lawyer received a total of $2,000 in fees for all services provided to the debtors. As a result of the pre-bankruptcy insolvency advice and planning, the debtors were able to resolve the issues concerning the three assets, and none of those assets was administered by the trustee.

Judge Glenn reviewed Section 330 of the Bankruptcy Code and also the factors set out in *Johnson v. Georgia Highway Express* for evaluating appropriate compensation. He relied primarily on the factors centering on the difficulty of the issue; the experience, reputation, and abilities of the lawyer; the time involved; whether the results were beneficial to the clients; and whether the fee was in line with customary compensation. However, of all those factors, he seemed most impressed by the difficulties and risk inherent in insolvency planning and not so much with how much actual time was spent – although the lawyer did prove that significant time was spent on the matter. The following is an excerpt of his ruling from the bench:

> The value of the services is not measured only by a dollars-times-hours multiplication… This isn't a dollars-times-hours analysis, to me. The novelty and difficulty of the questions is important to me. Insolvency planning is a difficult area. We all look at it regularly. We all look at the cases. It's a developing area. There are risks involved. There could be significant time involved; there might not be significant time involved. An interesting statement by one of the witnesses was: that the better the planning, the less time may be involved in issues that result down the road. But it is a difficult area to consider and in which to give advice. As another witness pointed out, there may be problems if such advice is not rendered; there may be problems if such advice is rendered, but that it is a difficult area. And I do note that it's a difficult area.

Other notable lessons to be gleaned from the ruling include:

- Even though contemporaneous time records were not kept, the testimony and documentary evidence established that significant time was expended by both the lawyer and the lawyer's staff.

- The judge recognized that "[a]t times much more time is involved than is compensated in a flat fee."

- The $1,000 fee is "at the low range of a customary flat fee. An hourly fee would likely have been higher."

- If a bankruptcy ensues and the lawyer who provided the insolvency planning services is the lawyer for the debtor in the case, the insolvency planning fee must be disclosed on the Rule 2016 statement as compensation paid within one year before the filing of the petition in bankruptcy, or agreed to be paid, for services rendered or to be rendered on behalf of the debtor in contemplation or in connection with the bankruptcy case.

2004 FLORIDA EXEMPTION

Continued from page 19

withdrew funds from a bank account and allegedly put them at risk by investing them in treasury bonds and mutual funds.

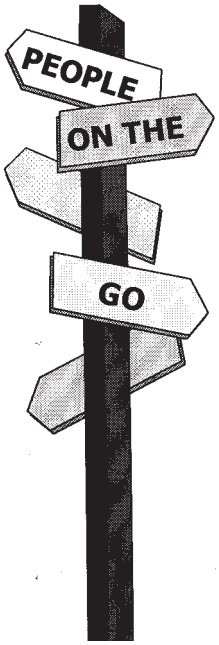
VENUE FOR CLAIMING EXEMPTIONS

In **In re Dwyer**, 305 B.R. 582 (Bankr. M. D. Fla. 2004), the Court allowed a Chapter 7 debtor to assert Florida exemptions even though the debtor was not physically present in Florida for the requisite time period prior to the petition date (i.e. majority of the 180 days preceding the petition date). In this case, however, the Court ruled that the debtor was never domiciled in North Carolina (where he was physically present during the pertinent period) or in any other state. The debtor was registered to vote only in Florida, his vehicles were registered in Florida, he held a Florida driver's license, and stated at all times he considered himself a Florida resident notwithstanding his two year absence from Florida.

29TH ANNUAL SEMINAR ON BANKRUPTCY LAW AND PRACTICE: DECEMBER 3-4, 2004

Once again, the annual Bankruptcy Law and Practice Seminar, sponsored by Stetson University College of Law and Chaired by the Honorable Alexander Paskay, was held in Clearwater on December 3-4, 2004. Now in its 29th year, the annual seminar continues to be a great success. This year, the Seminar provided the over 200 attendes with practice tips and the lastest updates on bankruptcy law on subjects ranging from new developments in Article 9 through tax issues in Bankruptcy. As the pictures below show, the Seminar is not just about case law and code sections.

by Andrew T. Jenkins
Bush Ross Gardner Warren & Rudy, P.A.



Carrie Beth Baris and **Karen S. Cox** have been named shareholders at the law firm of **Bush Ross Gardner Warren & Rudy, P.A.** Ms. Baris' practice concentrates in all areas of bankruptcy law and Ms. Cox's practice concentrates on bankruptcy appellate and litigation matters.

Paige A. Greenlee has joined **Hill, Ward & Henderson, P.A.** in Tampa as an associate in the creditors' rights and bankruptcy group.

Ryan S. Marsteller has joined **Jennis & Bowen, P.L.** as an associate with his practice concentrating in the areas of bankruptcy law and commercial litigation.

David S. Jennis of **Jennis & Bowen, PL** was recently certified in Business Bankruptcy Law by the American Board of Certification.

Luis Martinez-Monfort has been named a partner at the law firm of Mills Paskert Divers, P.A. Mr. Martinez-Monfort chairs the firm's creditor's rights and bankruptcy group.

CLERK'S LUNCHEON - November 18, 2004

For the second year in a row, to show its gratitude for all of the hard work that goes into making the Bankruptcy Court run so smoothly, the Tampa Bay Bankruptcy Bar Association hosted a luncheon in honor of the courthouse clerks and staff. Pipo's of Davis Island catered the luncheon. As the pictures show, everyone had a great time.

THE CRAMDOWN SURFS THE 'NET

Websites for Bankruptcy Practitioners

By Catherine Peek McEwen

Due to space limitations, the Cramdown was not able to publish the full text of this article in our last edition. However, the editorial board decided to run an abbreviated version and then run the full article in the Winter edition. Enjoy!

The Cramdown's occasional column on useful Internet websites returns in this issue. We welcome your suggestions for topical 'net resources that make our practice easier. In this issue's column, we reintroduce you to two old but updated friends — a practice resource newly converted to electronic form and a site to keep you on the cutting edge of new case law, and we provide you a time- and expense-saving tip on obtaining default judgments against individuals in adversary proceedings. Best of all, all three resources are free!

Marc Wites' Free, Online Florida Litigation Guide Provides Elements of Causes of Action/Defenses

ALERT! This new find is alone worth the price of Association membership: The slick, widely used *Florida Litigation Guide* published by Marc A. Wites is now available for *free* and *online*. Yes, the nifty pamphlet we told you about four years ago that once cost a bargain $45.00 is now offered electronically at www.flalit.com.

The Guide, updated annually at the end of September, now lists the elements of 59 common-law causes of action and defenses to each, together with the most recent state and federal court cases (applying Florida law) that cite the elements of each action and defense. With just two clicks of the mouse you can now impress your colleagues with how quickly you can call up elements necessary to your litigation or transaction. Material from the Guide can be copied and pasted on to word processing document, and it can also be printed from the Internet, so you can keep it in your briefcase for on-the-spot reference.

Learn of significant new cases daily and instantly

Those who pour over the contents of *The Cramdown* religiously (don't we all?) might remember our write-up on BKINFORMATION.COM, a comprehensive resource for bankruptcy news from around the world, links, and forms (now including interactive monthly operating reports in Quattro Pro, Excel, and WordPerfect). One of the site's most useful features is the hyperlink on the Daily Bankruptcy News page that is always located in the upper right hand corner of the newspaper-like, three-column format: New Bankruptcy Opinions. I don't know how they do it, but the site sometimes beats Westlaw and Lexis to the punch with significant new cases. Back issues are searchable, too. Simply by asking to be added to the distribution network, you can bring the Daily Bankruptcy News and its link to the day's new opinions to your desktop via email every day (go to the Home page at www.bkinformation.com, then link to Bankruptcy News and follow the instructions on where to click to be added).

Obtaining Nonmilitary Certificates Online for Free 24/7

The Servicemembers Civil Relief Act precludes the entry of a default judgment against an individual unless proof of non-military service is shown, such as a statement from the Department of Defense or from each branch of the armed services. The old-fashioned way of obtaining non-military certificates is to write each branch by snail mail and pay $5.20 per defendant. Only the old fashioned should keep doing it that way. For those in the web age, now a statement covering all branches is available from the Defense Manpower Data Center at no charge, online, 24 hours a day – but you have to become an approved user to have that privilege.

The Defense Manpower Data Center allows verification of non-military status for defense branches of armed services by providing access to a secure website for approved users. Potential users must call Genny Brooks at 703-696-6762 for information on how to obtain the necessary personal identification numbers and match codes from the Center. Ms. Brooks will fax you an online approved user application, which is returned to her by fax. There is an old-fashioned twist to obtaining approval, however. To fill out the form, one must use a typewriter, a drawback for those who discarded such relics. Once approved, users have 24-hour access to the site to search for information regarding military status. Documentation is provided electronically in a form with the seal of the Department of Defense and the signature of the Center's Director.

Just for fun

As usual, we conclude with something fun to clear the mind of your last task's clutter before moving on to a new task. This time we offer two tricks involving phone numbers. The first is a mathematical stumper: Grab a calculator. Key in the first three digits of your phone number (not the area code). Multiply by 80. Add 1. Multiply by 250. Add the last 4 digits of your phone number. Add the last 4 digits of your phone number again. Subtract 250. Divide number by 2. Gasp with amazement!

The second trick is two sites that convert a phone number into easy to remember mnemonics: www.phonespell.org and www.phonetic.com. What does your number spell?

View from the Bench Seminar: 2004

Continued from page 18

future actions of the Supreme Court. This year the presenters went one step further. The moderator, Roberta Colton, introduced each of the featured Supreme Court decisions with a song set to the tune of an oldy but goody hit by the Supremes. Roberta performed solo without the benefit of back up singers and without the protection of the beehive hairdo. The lyrics to one of Roberta's songs is reproduced below for those of you not lucky enough to experience it live and in person. Judge Mark jumped in with a return engagement. Judge Glenn brought down the house with his own special rendition of one of his recent decisions. The lyrics of Judge Glenn's ditty are also reproduced below. By the end of the seminar, Judge May and Judge Jenneman were planning a rap duet for next year.

As the attendees gathered up their belongings and returned to the real world, and the Judges put their robes back on or boarded the plane for a reprise in Miami, I am confident that all shared my own conclusion that there is just no end to the legal and other talents of the bar and bench in Florida. For those from Missouri, the Florida Bar has videotapes and materials available.

Roberta Colton's song
STOP (Sung to "Stop in the Name of Love")

Stop when the case converts
Or you will end up worse
Stop when the trustee comes,
'Cuz she'll throw out the bums
Think it over
'Cuz it's over . . .

Lamie v. United States Trustee, 124 S.Ct. 1023 (2004)

Judge Glenn's song (Sung to "Officer Krumki")

Dear kindly Sergeant Colton
They thought they had it good
They thought, "Ah, a safe harbor."
But they misunderstood.
I cleared it up in Star Trust
The Circuit did agree.
Bad Faith's out if it's in front of me.

Oh, Officer Colton.
What are they to do?
There's no safe harbor for a bad faith filing or two.
If they give their lender some improper grief—
Stay, Officer Colton, relief!

(Reprise)

And Officer Colton,
They're down on their knees,
'Cause no Court wants a debtor with a bad faith disease.
Oh, Officer Colton, what are they to do?
Gee, Officer Colton, they're through.
Oh, Officer Colton, it's Death they have kissed.
Case, Officer Colton, dismissed!

Continued from page 7

- Rules for the attorney's email notifications/email addresses/pacer charges
- Briefly discuss the training login and password
- Open a Chapter 13 case
- Upload a creditor matrix
- File an Amendment to Schedules
- File various documents (Motion to Determine Secured Status, Amended Motion, Response)
- File a proof of claim
- Demonstrate the payment of filing fees
- Review and research information using the CM/ECF reports
- Distribute and discuss training assignment and class evaluation form
- Demonstration of opening an adversary proceeding to anyone who wants to stay after class

TOPICS COVERED IN CREDITOR ATTORNEY CLASSES:

- Use of the internet browser to access ECF
- Court's website
- Rules for the attorney's email notifications/email addresses/pacer charges
- Briefly discuss the training login and password
- File various documents (Notice of Appearance, Motion for Relief from Stay, Amended Motion)
- File a proof of claim
- Open an adversary proceeding
- Demonstrate the payment of filing fees
- Review and research information using the CM/ECF reports
- Distribute and discuss training assignment and class evaluation form

6. Does the attorney have to complete a test to receive his or her attorney password?

Yes, a training assignment is distributed at the end of the class. Only the attorney is responsible for taking the training assignment, however, everything included in the assignment is demonstrated in class. The attorney is asked to file dummy documents in the training database that demonstrate the skills taught in class.

Examples of dummy documents that a debtor's attorney must file to complete the training assignment include opening a Chapter 13 case, filing a statement of debtor's social security number, filing a declaration of electronic filing, uploading a creditor's matrix, filing various pleadings, and filing a proof of claim. Examples of dummy documents that a creditor's attorney must file include filing a notice of appearance, filing various pleadings, filing a proof of claim, and filing an adversary proceeding. The dummy documents can be created with a title of the pleading the document purports to be and a /s/ signature. The principal purpose of the training assignment is to demonstrate the attorney's familiarity with electronic filing.

The training assignment is an "open book, open notes, open phone call, open trainer" test, and the trainers are accessible during the testing (if done during ordinary business hours of the Court) to assist the attorney with questions that may arise. Once the training assignment is completed, it is faxed to the clerk's office. One of the trainers reviews the training assignment for errors and will contact the attorney if any are found. Almost 100% of all attorneys who finish and submit the training assignment receiving a passing score. The attorney password is e-mailed to the attorney within 24-48 hours from the time the trainer reviews the training assignment.

7. What ongoing support is available to an ECF/CM filer?

The trainers provide support from the onset of training forward. At the training class, a handout is disseminated listing all trainers in the Tampa/Ft Myers, Orlando, and Jacksonville divisions with e-mail addresses and telephone numbers. ECF users are strongly encouraged to contact the trainers with any questions or concerns they are having with the system, their hardware, or their software.

The Cramdown would like to express its sincere thanks to Deborah Kerkes who contributed to the substantive content of this article.

If you are interested in participating in the Technology Committee, please contact Cheryl Thompson at cthompson@gray-robinson.com.

PRESIDENT BUSH SIGNS CHAPTER 12 LEGISLATION

Chapter 12 was signed by the President on Oct. 25. The legislation, which retroactively restores bankruptcy protections for farmers, extends chapter 12 until June 30, 2005. The retroactive provision would allow some farmers who filed under a different chapter to convert to a chapter 12 filing if their bankruptcy is not yet final.

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